Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1820

JACK M. STRICKLIN, JR., WILLIAM ELVIN HARRIS, TERRY WILLIAM JOHNSON, JOHN HENRY FRANKLIN, and WILLIAM HOBERT RUSSELL,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioners, JACK M. STRICKLIN, JR., WILLIAM ELVIN HARRIS, TERRY WILLIAM JOHNSON, JOHN HENRY FRANKLIN, and WILLIAM HOBERT RUSSELL, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, rendered in these proceedings on April the 22nd, 1976, with rehearing and rehearing en banc denied on May the 17th, 1976.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of New Mexico, which is unreported, appears at Appendix A, *infra*, pp. 1a-8a. The opinion of the Court of Appeals, appearing at Appendix B, *infra*, pp. 9a-18a, and its opinion denying rehearing and rehearing en banc, appearing at Appendix C, *infra*, pp. 19a-20a, are not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April the 22nd, 1976. See Appendix B, *infra*, pp. 9a-18a. A petition for rehearing and rehearing en banc was denied on May the 17th, 1976. See Appendix C, *infra*, pp. 19a-20a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. Brignoni-Ponce*, ___ U.S. ___, 45 L.Ed.2d 607, 95 S.Ct. ___ (1975), prohibits the warrantless stopping of a vehicle by Wildlife Officers on grounds of mere suspicion that the occupants have violated a State gaming statute in violation of the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained as a result of the stopping.

2. Whether the warrantless stopping of a vehicle by Wildlife Officers on grounds of mere suspicion that the occupants have violated a State gaming statute

authorizes an extensive search of said vehicle in the hopes of discovering evidence of any violation of the State gaming statutes.

3. Whether the decision below is inconsistent with the decisions of this Court in *Chambers v. Maroney*, 339 U.S. 42 (1970) and *Carroll v. United States*, 267 U.S. 132.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. New Mexico Statutes §53-2-37 provides in pertinent part:

> It shall be unlawful for any person or one [1] or more of a group of persons together to throw or cast the rays of a spotlight or other artificial light unto any field, pasture, woodland, forest or prairie wherein big game or domestic livestock may be reasonably expected to be, while having in his possession or their possession or under control a firearm or other implement

whereby any big game animal or domestic animal could be killed by aid of an artificial light.

3. New Mexico Statutes §53-2-22 provides in pertinent part:

> A. The director, each conservation officer, each sheriff in his respective county and each member of the New Mexico State police shall enforce chapter 53 NMSA 1953 and shall:
>
> (1) seize any game or fish held in violation of this chapter;
>
> (2) with or without warrant, arrest any person whom he knows to be guilty of a violation of this chapter; and
>
> (3) open, enter and examine all camps, wagons, cars, tents, packs, boxes, barrels and packages where he has reason to believe any game or fish taken or held in violation of this chapter is to be found, and seize it.
>
> B. Any warrant for the arrest of a person shall be issued upon sworn complaint, the same as in other criminal cases, and any search warrant shall issue upon a written showing of probable cause, supported by oath or affirmation, describing the places to be searched or the persons or things to be seized.

STATEMENT OF FACTS

At approximately 1:00 o'clock A.M. on August the 18th, 1974, Larry Turner, a Wildlife Officer of the New

Mexico Department of Game and Fish, stationed in Roswell, was assigned to night patrol northeast of Roswell, New Mexico, checking for illegal spotlight hunting when he observed a brief glow of light on the horizon to the northeast. Turner contacted Wildlife Officers Tom Moody and Lloyd Hann, who were also patrolling, and the three Officers met at a designated location and decided to separate and move to higher ground in an effort to locate the light source. Hann and Turner observed an aircraft slightly west of the area where the light had been observed. However, the significance of the aircraft did not become apparent to these Officers, or anyone else, until after the arrest and search.

At approximately 3:30 o'clock A.M., two vehicles, one of which the Officers believed was pulling a trailer, were observed on a dirt road in a range land area used primarily by recreational vehicles and ranch vehicles. All three Officers then observed the vehicles and, through radio communication, determined that the vehicles had turned around. The Officers then temporarily lost sight of the vehicles, decided to change positions, and attempted to again observe the vehicles that they had previously seen. Moody and Hann somehow managed to get behind the vehicles while Turner parked his vehicle, blocking the road which the vehicles were approaching. The Officers, by radio, then elected to stop the vehicles at Turner's position, which the vehicles were approaching. Moody and Hann were following the vehicles from behind.

The first vehicle that was stopped was a Chevrolet half-ton pickup truck with an open bed. Turner went

directly on back to the pickup with his flashlight. Defendant STRICKLIN, the passenger in the cab, got out of the vehicle and inquired why they had been stopped. Turner replied that they were checking for illegal hunting and with the aid of a flashlight observed several individuals riding in the bed of the pickup. He then asked STRICKLIN if they had any firearms, and STRICKLIN replied that they had a couple of pistols and were just camping. Turner proceeded around the pickup and when he approached the passenger side, he observed a .38 caliber revolver, unloaded, lying on the seat with the cylinder open. On the floorboard he observed five battery-powered handlights. He further observed a brown attache case in the center of the floorboard and a plastic zipper bag under the seat on the right-hand side. There was also a hunting knife lying on the seat of the pickup. Turner then searched the glove compartment of the vehicle and found a .22 magnum pistol and what was later determined to be a starlight scope.

While Turner was searching the pickup, the second vehicle, a Chevrolet automobile with a U-Haul trailer attached, drove up behind the first vehicle. Appellant RUSSELL, the driver and sole occupant of the second vehicle, was asked by Turner as to the contents of the U-Haul trailer. Appellant RUSSELL replied that it contained household goods. Officer Moody, who had followed Appellant RUSSELL and who had told him to pull up behind the pickup, also told him that they were investigating possible game violations.

Turner then returned to the pickup truck and began to make a more detailed search. There were several unrolled sleeping bags in the bed of the pickup truck

and he began to search them for weapons or game or any kind of evidence of a game violation. He picked up the end of one of the sleeping bags and felt something heavy in the foot of it. He unzipped the bag and discovered two bricks of marijuana.

Meanwhile, Officer Moody was inspecting the rear of the U-Haul trailer for traces of blood or animal hair, but found none. He also could not detect any odor of marijuana.

At approximately 4:15 o'clock A.M., other law enforcement officers who had been called to the scene by Officer Turner arrived. Officer Franco, a Narcotics Agent of the New Mexico State Police, was shown the bricks of marijuana found in the sleeping bag in the bed of the pickup truck. He then proceeded to the rear of the U-Haul trailer where he detected a strong odor of marijuana. Franco then pried the door open, without breaking the lock, and observed what appeared to be marijuana. He then arrested the Appellant and at the same time Turner also formally arrested them for a game violation. Franco then drove the car and U-Haul trailer to the State Police Office in Roswell, New Mexico, where he inventoried the contents of the vehicle and trailer, finding two thousand two hundred and fifty (2,250) pounds of marijuana.

REASONS FOR GRANTING THE WRIT

United States Court of Appeals for the Tenth Circuit has decided a Federal question in a way in conflict with applicable decisions of this Court.

1. In *United States v. Brignoni-Ponce* this Court recently held that Border Patrol Officers on roving patrol could stop vehicles only if they were aware of specific articulable facts, together with rational inferences from those facts, that reasonably warranted suspicion that the vehicle contained aliens who might be illegally in the Country. The Court further held that the apparent Mexican ancestry of a vehicles occupants was not sufficient, standing alone, to justify stopping a vehicle. This Court further held that when an officer's observations have resulted in him detaining a car briefly to investigate the circumstances that provoked his suspicion, he may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

In the present case, the Wildlife Officers justified their detaining of the Appellants on New Mexico Statutes §53-2-37 which prohibits what is commonly known as "spotlight hunting". However, the similarities between this case and the *Brignoni-Ponce* case are quite apparent. In the *Brignoni-Ponce* case the Border Patrol Officers attempted to justify their detention of the Appellants on the fact that they appeared to be of Mexican ancestry. Once the Officers were able to detain the vehicle and question the occupants, they learned that the occupants were in fact illegally in the Country. In the present case, the Wildlife Officers attempt to justify their detention of the vehicle on the fact that the vehicle's headlights were casting an artificial light where game may be reasonably expected to be. The obvious flaw in this reasoning is that the Wildlife Officers would be permitted to stop any vehicle traveling in the area at nighttime since the vehicles headlights would have to be functioning after dark. This reasoning is completely contrary to this Courts decision in the *Brignoni-Ponce* case.

2. Even if the Wildlife Officers were justified in temporarily detaining Appellants to investigate a possible violation of the illegal spotlight hunting statute, nothing resembling probable cause to search the bedrolls in the bed of the pickup truck existed until after the search itself had turned up the marijuana in the bedrolls. *Sibron v. New York*, 392 U.S. 40. The discovery of a weapon in the pickup truck, combined with the fact that an artificial light had been cast into an area where game may be reasonably expected to be, might have produced a technical violation of the New Mexico Statute in question. However, there was no evidence that the Wildlife Officers had any reason to believe that they would find any evidence pertaining to a crime before they began their warrantless search of the pickup truck. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *Henry v. United States*, 361 U.S. 98.

3. The circumstances surrounding the stop and search of the pickup truck for evidence of a game violation was not such that could justify the search under the exception to the rule found in *Carroll v. Unit-*

ed States and *Chambers v. Maroney*. Both of these cases hold that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize.

In the present case, it is undisputed that at no time prior to the discovery of the marijuana in a bedroll in the bed of the pickup truck, none of the Wildlife Officers were aware of any circumstances which would indicate that they would find any evidence of a game violation. As stated by this Court in *Carroll v. United States*, it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. 267 U.S. at p. 153, see also *United States v. Newman*, 490 F.2d 993 (10th Cir. 1974).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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JOSEPH S. CHAGRA

CERTIFICATE

I, Joseph S. Chagra, do hereby certify that three (3) copies of the above and foregoing petition for a writ of certiorari have been mailed, postage prepaid, to Hon. Robert H. Bork, The Solicitor General, U. S. Department of Justice, Room 5612, Washington, D. C. 20530, on this the 15th day of June, 1976.

JOSEPH S. CHAGRA

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,

versus No. 74-235 Crim.

JACK M. STRICKLIN, JR., WILLIAM ELVIN HARRIS, JERRY STEPHEN SHANKLES, TERRY WILLIAM JOHNSON, JOHN HENRY FRANKLIN, and WILLIAM HOBERT RUSSELL,
Defendants.

OPINION AND ORDER

Filed: Mar. 14, 1975

This case came on for trial combined with a hearing on defendants' motion to suppress. It involves the phenomenon of non-scheduled nighttime air service between marijuana producing areas or storage facilities and remote dirt strips, de facto international airports in unpopulated areas of the Southwest. Detection and apprehension is difficult, but occasionally an arrest is made fortuitously as described below.

On August 18, 1974, Larry Turner, a Wildlife Officer of the New Mexico Department of Game and Fish stationed in Roswell, was assigned to night patrol Northeast of Roswell. He was looking for illegal spotlight

hunting in an area where violations were common. At approximately 1:00 A.M., he observed a brief glow of light on the horizon to the Northeast. Turner contacted Wildlife Officers Tom Moody and Lloyd Hann, who were patrolling elsewhere.

The three officers met at a designated location and decided to separate and move to higher ground in an effort to locate the light source. Hann and Turner observed an aircraft slightly West of the area where the light had been observed. The significance of the aircraft did not become apparent to these officers, or anyone else, until after the arrest and search.

Two vehicles, one of which was pulling a trailer, were observed travelling together. The vehicles were on a dirt road in a rangeland area used primarily by recreational vehicles and ranch vehicles, normally during daylight hours, with some late-evening, early-morning hour ranch traffic. Moody observed the vehicle lights were sweeping into the fields along the side of the roads, a practice referred to as road hunting. The lights appeared, then disappeared, justifiably causing suspicion of illegal activity sufficient to warrant stopping the vehicles. *Terry v. Ohio*, 392 U.S. 1. The officers, by radio, elected to stop the vehicles at Turner's position, which the suspect vehicles were approaching. Moody and Hann were following the vehicles from behind.

At approximately 3:30 A.M., the lead vehicle, a Chevrolet pickup, was stopped. Defendant Stricklin, the passenger in the cab, got out of the vehicle and inquired why they had been stopped. Turner replied that

they were checking for illegal hunting and went to the pickup. With the aid of a flashlight he observed several individuals riding in the bed of the pickup. He then asked Stricklin if they had any firearms. Stricklin replied that they had a couple of pistols and were just camping. Turner looked into the cab and observed on the seat, in plain view, a .38 calibre revolver and five large battery-powered, hand-held lights. There was also a hunting knife on the seat. An attache case and a plastic zipper bag were observed in the cab, the contents of which were later determined to be portable aircraft transceivers. Turner searched the glove compartment finding a .22 magnum pistol and what was later determined to be a starlight scope. Turner did not suspect that he had stumbled onto a drug scheme at this time, but proceeded on the theory that they were hunting game or livestock. Defendant Franklin then volunteered that they were just shooting some cottontails.

The second vehicle, a Chevrolet with a U-Haul trailer attached, was at the scene and was driven by defendant Russell. Turner asked Russell what the contents of the trailer were and he was told that it was household goods. Having little faith in that seemingly implausible statement, he directed his attention to the bed of the pickup, moving several unrolled sleeping bags in a search for weapons or game. One sleeping bag had a heavy object in it and was searched by the officer. (He testified that game is often found butchered and wrapped.) The package in the sleeping bag was two kilo bricks of marijuana. At this time Officer Turner knew he had stumbled on a strange breed of rabbit hunter and he called the State Police for assistance. Hann, armed with a riot gun, held the oc-

cupants of both vehicles. The significance of the aircraft radios was now apparent. Officer Romero, of the Chaves County Sheriff's Office, was the first to arrive. Officer Franco, of the State Police Narcotics Division, and others arrived at 4:15 A.M.

Officer Moody had directed his attention primarily to Mr. Russell. He observed the rear of the trailer looking for traces of blood or animal hair. He didn't smell any odor of marijuana. Russell had offered to open the U-Haul door with an obviously incorrect key. When Franco arrived, he was already alert to the possibility of marijuana in large quantities. He was shown the two kilos of marijuana by Turner and proceeded to the U-Haul where he immediately detected a strong odor of marijuana. He asked Officers Kyper, Burden and Turner if they could smell it, also. They were able to detect the odor. It seems appropriate to observe that narcotics agents have special training in detecting the odor of marijuana. They also have great experience in knowing when to smell marijuana. *U.S. v. Bowman*, 487 F.2d 1229. After Russell offered Franco the same opportunity to open the padlock with the wrong key, Franco pried the door open without breaking the lock and observed what appeared to be marijuana. Franco then arrested the defendants. (Turner also formally arrested them for a game violation at this time, although they had a foolproof defense that couldn't be used.) Franco drove the car and trailer to the State Police Office in Roswell where he inventoried the contents of the vehicle and trailer, finding 2,250 pounds of marijuana.

The next morning Moody and Romero went to a dirt air-strip eleven miles distant from the place of arrest.

They observed fresh tracks of two vehicles, one of which was possibly pulling a trailer. There was evidence of foot traffic by several individuals and signs of heavy cargo having been placed on the ground. Vegetable debris resembling marijuana was also found.

This case involves three or four distinguishable searches. Each search provided additional information leading to the next search. Therefore, if a link in the chain of searches violated the Fourth Amendment, the succeeding searches will be adversely affected.

There was sufficient evidence to justify the initial investigatory stop. The Conservation Officers reasonably suspected illegal spotlight hunting in violation of N.M.S.A. 53-2-37. That Section declares it illegal to cast the rays of an artificial light into an area where game and domestic livestock might be present while in possession of a firearm capable of killing an animal with the aid of a light. The statute requires no other proof to constitute a violation. Both vehicles were present in a game and livestock area at a late hour and sweeping motion of lights was observed. The fact that sweeping motion might have been caused by driving on unimproved vehicle path did not make the initial stop unreasonable.

Turner's observation of the five hand-lights, the pistol and the hunting knife in plain view in the cab was not a search. But these observations, coupled with Stricklin's statement that there were multiple weapons, justified the officers' further search of the pickup for additional weapons and illegal game. He

was not required to discontinue his search after discovery of a second weapon among five or six persons because it was reasonable to expect that more weapons or game would be found if illegal hunting was the reason for defendants' presence in the area. (It is not clear that the starlight scope and radio were facts on which Officer Turner determined and relied on prior to searching the pickup.) A search for dead game was justifiable on the theories that it was evidence of a violation of the game laws or fruits of the crime. The conservation officer also had statutory authority to seize illegally taken game pursuant to N.M.S.A. 53-2-22. Officer Turner, therefore, did not violate the Fourth Amendment by searching the bedroll for game.

Defendants have attached N.M.S.A. 53-2-22, the statute under which conservation officers may conduct searches when they have *reason to believe* illegally taken game would be found. I construe this to mean probable cause and have already found probable cause to search the pickup. Defendants also attack the statute on the ground that it allows a law enforcement officer to make an independent determination of probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443. I do not consider this theory applicable here. The State statute attempts to draw another exception to the warrant requirement. It is not necessary to decide whether searching hunters in remote areas might be justifiable upon probable cause under the fleeting target theory. This case must stand or fall as a vehicle search pursuant to *Chambers v. Marony*, 399 U.S. 42, and *Carrol v. U.S.A.*, 267 U.S. 132. I find no fault with the search of the pickup.

The next search to take place was the initial search of the U-Haul where Officer Franco pried the door open and saw what appeared to be marijuana. Probable cause for this search is argued from circumstantial evidence that the vehicles were travelling together, the discovery of the two kilos of marijuana in the pickup and the odor of marijuana detected by Officer Franco.

In *U.S. v. Bowman*, 487 F.2d 1229, this Circuit held that smell alone *could* satisfy the probable cause requirement. In *Bowman*, the trial judge found that Agent Goad did, in fact, smell marijuana. I am not willing to make an unequivocal finding that Agent Franco did smell marijuana. Officer Franco's credibility is not challenged. Franco came to the scene to investigate a marijuana case with an alert nose that wanted to smell marijuana. Although his observation was corroborated by other officers, there was substantial suggestiveness inherent in confirming Franco's suspicions. Officer Moody was unable to detect the odor when he was looking for evidence of the game violation. His sense of smell, while less acute than a narcotics officer, was not tainted by external suspicions.

Having found the search of the pickup constitutional, the issue of Russell's standing to challenge that search needs no discussion. I find probable cause to search the trailer existed when Franco was shown the two kilo bricks of marijuana found in the pickup. (Two kilos of marijuana is a large quantity to take on an overnight camping trip.)

There were also exigent circumstances justifying the failure to obtain a warrant. Here the narcotics officers were rushing to the assistance of conservation officers who had chanced upon a situation which they were not trained to handle and were outnumbered two-to-one. The exigent circumstances normally present in vehicle stop cases were also present here. *Carrol*, supra; *Chambers*, supra.

The next search was agent Franco's inventory of the vehicle at the stationhouse. Probable cause once established will follow a vehicle to the stationhouse. If a vehicle can be searched initially on the highway, it can later be searched at the police station without warrant. *Chambers*, supra. This search can also be sustained as a forfeiture doctrine search.

The motion to suppress, therefore, is denied and all exhibits not previously admitted will be admitted. The evidence is sufficient to warrant finding all defendants guilty beyond a reasonable doubt of possession with intent to distribute a quantity of marijuana, and of conspiring to possess with intent to distribute a quantity of marijuana and judgment shall be entered accordingly.

/s/ [ILLEGIBLE]
UNITED STATES DISTRICT
JUDGE

APPENDIX B

PUBLISH

Filed: Apr. 22, 1976

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

versus Nos. 75-1394
75-1395
75-1396
75-1397
75-1398

JACK M. STRICKLIN, JR., WILLIAM ELVIN HARRIS, TERRY WILLIAM JOHNSON, JOHN HENRY FRANKLIN, WILLIAM ROBERT RUSSELL,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. # CR-74-235)

Lee A. Chagra, El Paso, Texas, for Appellants.

W. R. Hughes, Jr., Assistant United States Attorney (Victor R. Ortega, United States Attorney, and Harris L. Hartz, Assistant United States Attorney, on the Brief), for Appellee.

Before LEWIS, Chief Judge, SETH and BARRETT, Circuit Judges.

SETH, Circuit Judge.

Appellants appeal their conviction by a jury of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846.

Early on the morning of August 18, 1974, Officer Larry Turner of the New Mexico Department of Game and Fish was patrolling a thinly populated ranch and recreation area northeast of Roswell, New Mexico, checking for illegal nighttime hunting. At approximately 1:00 a.m., after he saw briefly a flashing light on the horizon, he contacted Wildlife Officers Tom Moody and Lloyd Haun who were also patrolling. The three officers met and decided to split up and attempt to pursue the light source. Soon thereafter two of the officers saw an airplane near the horizon.

Sometime later, Officer Turner saw two vehicles near a gate on a pipeline road. The vehicles were going away from him and the taillights indicated that one

was pulling a trailer. All three officers then observed the vehicles and, through radio communication, determined that the vehicles had turned around. The officers then temporarily lost sight of the vehicles, decided to change positions, and attempted to again watch the vehicles. Two of the officers again spotted the two vehicles and watched for about ten minutes as the vehicles, an automobile pulling a U-Haul trailer and a pickup truck traveling ten to twenty yards ahead of it, approached and then passed them. The vehicles were seen to be sweeping their headlights and thereby illuminating the areas to either side of the road. These two vehicles were the only ones seen in the area by the officers that morning.

At approximately 3:30 a.m., Officer Turner stopped the lead vehicle, an open-bed pickup truck. Appellant Stricklin got out of the truck on the passenger side and asked Officer Turner why they had been stopped. Turner replied that he was checking for illegal hunting. The officer then went to the rear of the truck and with the aid of a flashlight saw appellants Harris, Johnson, and Franklin seated in the open bed of the pickup. Turner then asked Stricklin if they had any firearms, and he replied that they had two pistols. He also said that they were just camping. Turner asked Stricklin why they were driving around at 3:30 a.m., and he replied that they had decided to leave.

Officer Turner went to the passenger side of the truck and saw a .38 caliber revolver and a hunting knife on the seat. On the floor of the truck, he saw five battery-powered handlights as well as an attache case and a plastic zippered bag. Turner then searched the glove compartment of the truck and found a .22

magnum pistol and a starlight scope, a device used for hunting and other purposes in the nighttime.

While Turner was searching the pickup, a car pulling a U-Haul trailer drove up behind the first vehicle. The driver and sole occupant of the automobile was appellant Russell, who owned the car and who had rented the U-Haul trailer several days before. Officer Moody, who had followed appellant Russell and who had told him to pull up behind the pickup, also told him that they were investigating possible game violations. When Officer Turner asked Russell what was in the trailer, Russell responded that it contained household goods.

Officer Turner then returned to the pickup truck and began to make a more detailed search. There were several unrolled sleeping bags in the bed of the truck and he began to check them for evidence of game. He picked up one of the bats and felt the weight of a heavy object at the foot of it. He unzipped the bag and discovered two bricks of marijuana.

Meanwhile, Officer Moody was inspecting the rear of the U-Haul trailer for signs of blood or animal hair, but found none. Appellant Russell voluntarily attempted to open two padlocks on the door of the trailer, but the keys did not fit. Russell gave the keys to Officer Moody, but Moody's attempts to open the trailer doors also failed.

About 4:15 a.m., other law enforcement officers who had been called to the scene by Officer Turner arrived. Officer Jesse Franco, a narcotics agent of the New

Mexico State Police, was shown the bricks of marijuana found in the sleeping bag. He then went to the rear of the U-Haul trailer where, he later testified, he detected a strong odor of marijuana. Officer Franco asked appellant Russell for the keys to the trailer. When none of the keys fit, Franco and another officer pried open the trailer door enough to permit the officers to see what appeared to be several sacks containing bricks of marijuana. The appellants were placed under arrest for narcotics and game violations, and taken to town. There, when the appellants were advised of their rights, appellant Stricklin stated that he had already called a friend who would take care of all of the appellants.

A later examination of the contents of the U-Haul trailer revealed 2,250 pounds of marijuana in brick form in eighty plastic sacks. All but one of the sacks were sealed and contained twelve to fifteen bricks of marijuana each. The open sack, which was found in the lower left front corner of the trailer, contained only eleven bricks. The keys to the padlocks on the door of the trailer were found in a shaving kit in the rear of appellant Russell's automobile.

At about 11:00 a.m. on the same morning, Officer Moody and Officer Romero of the Chavez County Sheriff's office visited a landing strip approximately eleven miles northeast of where the appellants had been apprehended. They there found fresh evidence of tire tracks on the pipeline road leading to the airstrip. The tracks appeared to be from two vehicles, one pulling a trailer. The tracks crossed the airstrip and returned to the pipeline road and on to the Red Bluff

Road, the hard gravel road on which appellants were apprehended. On cross-examination, Officer Moody stated that the tracks at the airstrip appeared to match the tires of appellants' vehicles.

The appellants were convicted as noted above, and raise several grounds for reversal.

Appellants contend initially that the searches of both the truck and the U-Haul trailer were improper.

They urge that the officers did not have probable cause to stop the pickup truck initially, and that even if the stop was proper, the search of the bed of the pickup and the bedrolls was not based upon probable cause.

The officers stopped the vehicles upon the reasonable belief that the occupants were engaged in illegal nighttime hunting. As described above, all three officers observed the appellants' vehicles traveling for an extended period of time in a deserted area. They were moving and changing directions together. Officers Moody and Haun testified that the vehicles appeared to be "sweeping" their headlights and thereby illuminating areas to the side of the road. These circumstances provided valid probable cause for detaining the vehicles. United States v. McCormick, 468 F.2d 68 (10th Cir.).

Appellants next contend that even if the detention was proper, the search should not have extended to the bed of the truck and the bedrolls. United States v. Newman, 490 F.2d 993 (10th Cir.), is cited by appellants to

support the argument that the present search was over-extensive, but it is not applicable. Officer Turner, when the pickup was stopped, saw a .38 caliber revolver, a hunting knife, and battery-powered handlights on the seat and floor of appellant's pickup truck. These instruments are tools of a nighttime hunter and supplied Officer Turner with additional probable cause to believe that appellants were engaged in illegal hunting activity. A further, more detailed search of the truck and its contents was fully warranted.

The search of the U-Haul trailer was likewise justified. Facts indicate that the officers had reason to believe that the two vehicles, the pickup truck and the automobile pulling the trailer, were traveling together as they so observed them. Also the search of the trailer was justified on the ground that Officer Franco smelled marijuana at the rear of the U-Haul. This Circuit has recognized that the odor of marijuana can supply the probable cause necessary for a search. United States v. Bowman, 487 F.2d 1229 (10th Cir.). While it is true that odor will not supply probable cause when an otherwise unjustified search is already in progress, United States v. Newman, *supra*, there is no evidence here that a search of the U-Haul had been commenced prior to the detection of the marijuana odor by Officer Franco.

Appellants finally argue that a warrant was necessary to validate the present search. The circumstances of the case justified the warrantless search of appellants' vehicles. *See* United States v. Troutman, 458 F.2d 217 (10th Cir.).

Appellants argue that the trial court erred in admitting certain testimony of Officer Moody who testified that he had visited an airstrip in the area as part of a post-arrest investigation. He stated that fresh vehicle tracks were discovered at the site and that traces of marijuana were present. On cross-examination, he testified that the tracks at the site appeared to match the tires on appellants' vehicles. Appellants objected to the relevancy of this testimony. However, the admission of Officer Moody's testimony was well within the discretion of the trial court. United States v. Downen, 496 F.2d 314 (10th Cir.). The officers had found in the pickup portable radios designed to work on frequencies used by aircraft.

The next point urged by appellants is that the evidence was insufficient to support their possession convictions. However, we must hold that this evidence, direct and circumstantial, and with reasonable inferences to be drawn therefrom, when viewed in the light most favorable to the Government constitutes sufficient substantial evidence supporting the jury's determination of the defendants' guilt beyond a reasonable doubt. United States v. Guerrero, 517 F.2d 528 (10th Cir.).

The evidence as to appellant Russell establishes without doubt that he was the owner, driver, and sole occupant of the automobile pulling the U-Haul trailer; also that he was the sole lessee of the trailer, and keys to the trailer door were in his possession. These facts are sufficient to support the jury's conclusion that he was in possession of the marijuana found in the trailer.

The other appellants contend that there is insufficient evidence to prove that any of them had possession of the marijuana found in the bedroll located in the bed of the pickup, or to prove that any of them had possession of the marijuana found in the U-Haul trailer. The Government counters that Russell and the remaining appellants were engaged in joint activity relative to the contraband, and that the evidence supports the jury's finding of joint and constructive possession of all of the marijuana by all appellants.

We considered constructive possession in Amaya v. United States, 373 F.2d 197 (10th Cir.), and considered the dominion and control necessary under 21 U.S.C. § 174. The issue arises frequently in situations where a car containing drugs is occupied by several persons. Depending somewhat on the place and quantity of the drug in the vehicle, we have started with the assumption that the driver has sole dominion and control. United States v. Henry, 468 F.2d 892 (10th Cir.); Wilson v. United States, 218 F.2d 754 (10th Cir.). In the last cited case, it was found that all the occupants of the car were engaged in a joint undertaking relative to the drugs, and hence all were in constructive possession. The Ninth Circuit, as to two occupants of a car, applied the same analysis, found no joint activity, and hence no possession by one of the two occupants. Bettis v. United States, 408 F.2d 563 (9th Cir.). Again, in an instance where the car was occupied by two persons, but there was no evidence of a joint purpose or relationship between the two, there was no possession by the passenger. United States v. Ferg, 504 F.2d 914 (5th Cir.). *See also* United States v. Martinez, 514 F.2d 334 (9th Cir.).

The evidence shows that the bricks of marijuana in the pickup were similar or identical in appearance to those in the U-Haul. It shows also that one of the sacks in the U-Haul had been opened and contained fewer bricks than did the others. The inference was certainly open to the jury that the bricks in the truck came from the sack in the U-Haul, and thus tied together the bricks, the vehicles, and the occupants. The observation of the movements of the two vehicles made by the officers over an extended period of time gives rise to the same inference. Appellant Stricklin told the officers that those in the pickup were camping and decided to leave. This again places all the appellants except Russell together. The officers testified that from the tracks, the two vehicles were together at the landing strip where marijuana had been handled.

When we consider the evidence in a light most favorable to the Government, as we must do upon a conviction such as this, we can reach no conclusion other than the appellants were all engaged in some joint activity relative to the marijuana and thus each and all were in constructive possession of it. The jury was entirely justified in reaching the conclusion that it did.

AFFIRMED.

APPENDIX C

MAY TERM — May 17, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Delmas C. Hill
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus Nos. 75-1394
75-1395
75-1396
75-1397
75-1398

JACK M. STRICKLIN, JR., WILLIAM ELVIN HARRIS, TERRY WILLIAM JOHNSON, JOHN HENRY FRANKLIN, WILLIAM ROBERT RUSSELL,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing and petition for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis and Circuit Judges Seth and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1820

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. STRICKLIN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1820

JACK M. STRICKLIN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim that the warrantless nighttime stop and search of a pickup truck, which disclosed marijuana, violated the Fourth Amendment.

Following a jury-waived trial in the United States District Court for the District of New Mexico, petitioners were convicted of possession of marijuana with intent to distribute and of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioners Stricklin, Harris and Johnson were each sentenced to concurrent five year terms of imprisonment to be followed by concurrent terms of four years' supervised probation; petitioners Franklin and Russell were each sentenced to concurrent five year terms of imprisonment to be followed by concurrent terms of three years' supervised probation. The court of appeals affirmed (Pet. App. B 9-18).

Early on the morning of August 18, 1974, Wildlife Officers of the New Mexico Department of Game and Fish, on patrol for illegal nighttime hunting, observed a pickup truck and an automobile pulling a U-Haul trailer traveling in tandem in a thinly populated ranch and recreation area northeast of Roswell, New Mexico (Tr. 7-8, 18-19). Both vehicles were observed to be sweeping their headlights into the fields along the side of the road, a practice commonly employed in illegal nighttime hunting (Tr. 9-11, 19).

The officers stopped the vehicles. Petitioner Stricklin, the driver of the pickup truck, informed Officer Turner that he and his companions had two pistols with them. In the cab of the pickup truck Officer Turner saw a .38 caliber revolver, a hunting knife, and five battery-powered handlights, implements frequently employed in nighttime hunting (Tr. 22-23, 25). A search of the glove compartment disclosed a .22 caliber magnum pistol with a starlight scope (Tr. 26). Turner then went to the bed of the pickup, where petitioners Harris, Johnson and Franklin had been riding, and searched several unrolled sleeping bags for weapons or game. In one of them he discovered two "bricks" of marijuana (Tr. 29-30).

The automobile pulling the U-Haul came to a stop at the rear of the pickup. The driver, petitioner Russell, told Officer Moody that the U-Haul contained only household goods (Tr. 28-29). After the marijuana was discovered in the pickup, New Mexico State narcotics agents were called to the scene. Agent Franco detected a strong odor of marijuana emanating from the U-Haul, whereupon it was forcibly opened, revealing what turned out to be 2,250 pounds of marijuana (Tr. 84-86).

The courts below correctly applied settled principles to the particular facts of this case, and the petition presents no legal issue warranting further review.

1. Petitioners claim first that the initial stop of their vehicles was unlawful. But the state wildlife officers had seen, at approximately 3:30 a.m., two vehicles travelling in tandem in a thinly populated ranch and recreation area where illegal nighttime hunting was not uncommon. In addition, the officers had seen the vehicles cast their lights from side to side in a manner similar to that employed by illegal "spotlight" hunters seeking to locate game along the roadside. These observations of likely illegal activity were enough to justify the officers' initial detention of the vehicles. See *Terry* v. *Ohio,* 392 U.S. 1.

United States v. *Brignoni-Ponce,* 422 U.S. 873, cited by petitioners, supports the government's case rather than theirs. In that case the Court ruled that Border Patrol agents on roving patrol can lawfully stop vehicles in the border area on reasonable suspicion (not amounting to probable cause) based on specific articulable facts. The facts recounted above were specifically articulable and justified the officers' reasonable suspicion that criminal activity was afoot.

2. Petitioners' second claim is that, even if the initial detention was lawful, the subsequent search of the sleeping rolls in the bed of the pickup truck was not. But petitioners themselves concede (Pet. 9) that Officer Turner's discovery of the pistol in the truck (not to mention the five hand-held lights), combined with the casting of artificial light in an area where game might reasonably be expected to be, "might have produced a technical violation of the New Mexico Statute" forbidding nighttime "spotlight" hunting. Petitioners Harris, Johnson, and Franklin were riding in the open bed of the pickup truck. These factors—probable cause to believe a crime was being committed, and the presence of the three petitioners in the bed of the truck—gave the officers probable cause to

believe that further evidence or fruits of the crime would be found in the bed of the truck and the items lying therein.

3. Petitioners also contend that the officers should have obtained a warrant before searching the bed rolls (Pet. 9-10). As we have just shown, however, the officers had probable cause to search the truck, and it is well settled in cases of this sort that automobiles may be searched upon probable cause without a warrant. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.